KANG CHAN YOKE

v.

YOUNG AH MOI

HIGH COURT MALAYA, MELAKA
WAN YAHYA J
[CIVIL APPEAL NO. 5 OF 1978]
16 JUNE 1982

LABOUR LAW: *Workmen's compensation - Question of law for determination of High Court - Whether deceased was a workman within the meaning of the Workmen's Compensation Ordinance - Deceased fell from his motorcycle while travelling from his house to the place of work and died - Whether accident arose out of and in the course of employment.*

LABOUR LAW: *Commissioner - Powers of - Function of - Duty of Arbitrator.*

This was an appeal against the decision of the Arbitrator pursuant to s. 39(2) of the Workmen's Compensation Ordinance 1952. The questions of law for the determination of the High Court were firstly, whether the deceased was a workman within the meaning of the Workmen's Compensation Ordinance and secondly, whether the accident arose out of and in the course of the deceased's employment.

The appellant who owned a rubber estate was the Employer of the deceased workman who worked as a rubber tapper and the respondent was his dependant mother. On the unfortunate day between 5.00 and 6.00 a.m., the workman was found injured by the roadside about 9½ mile away from the estate. Presumably he had fallen from his motorcycle while travelling from his house to his place of work. He was taken to the hospital but died on the same day. The matter was first taken up by the Commissioner who after failing to record any settlement on the above-mentioned issues, referred the claim to the Arbitrator. The learned Arbitrator, after considering the evidence which consisted partly of the record of the commissioner's enquiry and partly of the oral evidence adduced before him, answered both the questions in the affirmative and awarded compensation assessed at RM5,400. In fact, at the commencement of the case, the learned Arbitrator made a ruling for the appellant's case to proceed on the strength of the respondent's evidence as recorded by the Commissioner despite her objection, but allowed the respondent to cross-examine the witness.

Held:

[1] The proceedings before the Arbitrator in cases under reg. 40 of the Workmen's Compensation Regulations 1953 take the form of a fresh hearing which resembles a hearing in the High Court following a preliminary inquiry. It would therefore be desirable for the arbitrators when hearing disputed issues to commence hearing the evidence afresh instead of relying partly on the oral evidence as recorded by the Commissioner so that they may be able to observe the witnesses' demeanour, assess the weight of evidence and come to a proper conclusion on the value of the evidence presented.

[2] A person like the deceased, who worked under an oral contract to tap rubber for his employer and was remunerated on the basis of the amount of latex which he was able to tap for the day and who was required by such contract to obey directions as to the manner in which the work was to be done, is a workman within the meaning of s. 2 of the Workmen's Compensation Ordinance 1952.

[3] An accident which happened some 10 miles away in the course of the workman's journey to his place of work whilst travelling on his own transport and before he commenced his work for the day would not bring his accident within the course of employment.

[4] The respondent had failed to establish before the Arbitrator that the accident arose out of and in the course of employment.

[5] The appeal was therefore allowed and the order of the Arbitrator for the appellant to pay the compensation assessed at RM5,400 was quashed and the respondent had to pay the costs of the appeal.

[Appeal allowed with costs.]

Cases referred to:
Golden Hope Rubber Estate Ltd. v. Kuppusamy [1964] MLJ 178
Wardell v. Kent County Council [1939] 3 All ER 473
Kuppusamy v. Golden Hope Rubber Estate Ltd. [1965] MLJ 178
M'Garvey v. Caledonis Stevedoring Co. Ltd. [1943] 1 All ER 611
Eastern Mining & Metals Co. Sdn. Bhd. v. Wan Absah [1974] 2 MLJ 210
Charles P. Davidson & Co. v. M'Robb [1918] AC 304
St. Helens Colliery Co. Ltd. v. Hewiston [1924] AC 59
Gilmour v. Dorman, Long & Co. Ltd. [1911] LT 105
Netherton v. Coles [1945] 1 All ER 277

Legislation referred to:
Subordinate Courts Rules 1980, O. 22 r. 3
Workmen's Compensation Regulations 1953, reg. 39, 40
Workmen's Compensation Ordinance 1952, ss. 2, 4(1)(b), (5), 8, 10, 14, 15, 27, 30, 35(2), 39(2)

Other sources referred to:
Willis's Workmen's Compensation, 36th Edn., p. 24

For the appellant - Amir Ismail; M/s. Shearn Delamore & Co.
For the respondent - A.C. Vohrah; M/s. Vohrah & Tan Chee Lan

JUDGMENT

Wan Yahya J:

This is an appeal against the decision of the Arbitrator pursuant to s. 39(2) of the Workmen's Compensation Ordinance 1952. The questions of law for the determination of this Court are firstly whether the deceased was a workman within the meaning of the Workmen's Compensation Ordinance and secondly whether the accident arose out of and in the course of the deceased's employment.

The appellant in this case, who, for the purposes of this appeal, is referred to as the Employer, is the owner of a rubber estate in which the deceased workman (hereinafter referred to as the Workman) worked as a tapper and the respondent is his dependant mother. On the unfortunate day between 5.00 and 6.00 a.m. the Workman was found injured by the roadside some 9½ miles away from the estate. Presumably he had fallen from his motorcycle while travelling from his house to his place of work. The workman was taken to the hospital but he died on the same day, without regaining consciousness.

The matter was first taken up by the Commissioner, who, after failing to record any settlement on the above-mentioned issues, referred the claim to the Arbitrator.

The learned Arbitrator, after considering the evidence which consisted partly of the record of the Commissioner's enquiry and partly of the oral evidence adduced before him, answered both questions in the affirmative.

It may be convenient at this stage to comment on the procedure adopted by the learned Arbitrator, which I consider to be quite unsatisfactory. At the commencement of the case before him the learned Arbitrator, despite the objection taken up by the respondent, made a ruling for the appellant's case to proceed on the strength of her evidence as recorded by the Commissioner, but allowing the respondent to cross-examine the witness. In this respect it may be pertinent to reproduce the remarks made by Ong J in *Golden Hope Rubber Estate Ltd. v. Kuppusamy* [1964] MLJ 178 at p. 180 where His Lordship stated:

> Before leaving this case I ought to mention that the procedure followed in this case was entirely wrong and contrary to the provisions of the Workmen's Compensation Ordinance and the Regulations thereunder. The function of the Commissioner for Labour, under s. 27 of the Ordinance, is only to hold an inquiry for the purposes of settling disputed questions between workmen and employer by agreement. Where such questions cannot be settled by agreement they have to be referred to the arbitrator for his award or decision (see s. 30). In this case agreement was manifestly out of the question from almost the very beginning of the proceedings, when the employer denied that the accident arose in the course of the deceased's employment. In default of agreement the Assistant Commissioner for Labour, as an administrative officer, had no jurisdiction whatsoever in proceeding any step further to undertake the judicial functions of holding an inquiry and deciding on the merits of the claim. These functions properly belong to the arbitrator. The Assistant Commissioner was thus acting *ultra vires* in making his so called "comments" which in effect were his personal grounds of judgment. I trust that hereafter practice will conform to reg. 38 to 41 of the Workmen's Compensation Regulations 1953, instead of treating them as a dead letter.

Now, the hearing conducted by a Commissioner, under s. 27, is an enquiry the purpose of which is merely to ascertain whether there can be agreement between the parties on any issue. If there is a complete agreement between the parties, the matter rests there, but if there is a dispute on any issue, then that issue must be referred to the Arbitrator for his decision in accordance with s. 30. By reg. 39 of the Workmen's Compensation Regulations, 1953, the Arbitrator may after considering the records taken by the Commissioner, summarily dismiss the application, but, if he does not do so, he has an obligation under reg. 40 to call upon the applicant to produce evidence in support of his application. By s. 35(2) of the Ordinance record of the enquiry before the Commissioner, no doubt, formed part of the evidence, but is that evidence sufficient for his purpose in determining the credibility of witnesses and coming to any conclusion on a question of fact or law? An enquiry before the Commissioner, other than those falling under ss. 8, 10, 14 & 15, being a preliminary hearing for exploring the possibilities of settlement, or for the determination of disputed questions, is usually less contentious in nature. Particular attention is normally directed towards the existence or otherwise of the matter to be agreed upon and not upon the veracity of these questions. In my view the application to an Arbitrator under s. 30 of the Ordinance involves two different matters. Firstly the application may be for the determination by the Arbitrator of the Commissioner's decision. The one in respect of the decision made by the Commissioner involves ss. 8, 10, 14 & 15 of the Ordinance. The Arbitrator may after perusal of the records dismiss the application summarily under reg. 39, but in respect of the other matters referred to him, the Arbitrator cannot dismiss but has to hear them since no decision can be made by the Commissioner in cases of dispute. The proceedings before the Arbitrator in such cases under reg. 40 take the form of a fresh hearing which resembles a hearing in the High Court following a preliminary inquiry. In my opinion, it would be desirable for the Arbitrators

when hearing disputed issues to commence hearing the evidence afresh instead of relying partly on the oral evidence as recorded by the Commissioner so that they may be able to observe the witnesses' demeanour, assess the weight of evidence and come to a proper conclusion on the value of the evidence presented.

Turning back to the Arbitrator's findings I feel it is quite unnecessary to go into his first finding at length. Although the question was raised up in the appellant's petition of appeal, Encik Amir, who appeared before the Commissioner, the Arbitrator and this Court, did not touch on the matter at all in the course of his arguments and appeared to have conceded to the finding of the Arbitrator on the issue. I agree with the Arbitrator's finding. A person like the deceased, who works under an oral contract to tap rubber for his employer and is remunerated on the basis of the amount of latex which he is able to tap for the day and who is required by such contract to obey directions as to the manner in which the work is to be done, is a workman within the meaning of s. 2 of the Workmen's Compensation Ordinance, 1952-see *Wardell v. Kent County Council* [1938] 3 All ER 473 at p. 475 EG.

On the second question, the Arbitrator first cites a sentence from the judgment in the case of *Kuppusamy v. Golden Hope Rubber Estate Ltd.* [1965] MLJ 178 which runs as follows:

> ... If she had fallen while going direct to her place of work the accident would have been in the course of her employment ...

On the basis of this short passage he concludes that any accident occurring to a workman during his journey to his place of work is an accident arising in the course of his employment.

The words of Thomson LP appear to have been misconstrued. In *Kuppusamy's* case the deceased was a tapper who resided in a housing quarter provided by her employer on the estate itself. On the day of the accident she attended the morning 'muster' and, instead of proceeding directly from there to her place of work, she went back to her quarters to collect some tool which was necessary for the day's work. In the High Court Ong J (as he then was) decided that her work for the day did not commence at the place of muster but at her allotted tapping area. His Lordship was relying on the case of *M'Garvey v. Caledonis Stevedoring Co. Ltd.* [1943] 1 All ER 611, where a docker met with an accident after he was released for overstaying his lunch hour and his shift duty taken over by another. The Federal Court however distinguished that case from *Kuppusamy's* case in the following words:

> But this is not what happened here. Nothing was done by the employers to terminate the contract of employment so far as the day's work was concerned. The woman went to `muster.' She had every intention of going on to her working place. She went home to get her tools and while entering or leaving her house she fell and sustained her fatal injuries.

The expression that the workman's contract of employment for the day had not been terminated and the reference to her intention of going from the place of muster to her 'working place' and also by the express mention of the tools being the necessary implements provided by her employer for the purpose of doing her day's work could only mean that the Federal Court considered her employment to have commenced immediately after 'muster' and that by the deviation of her journey from the place of muster to the place of work via her quarters was made in the course of employment as she had gone there for the purpose of getting the necessary tools for her day's work. But that if, on her way home after muster, she had been intercepted by her employer and reprimanded for breaking the estate's regulations and stopped from working for the day, then whatever accident occurring after that moment could not be taken as having happened in the course of her employment.

The passage cited was uttered in the context of this episode. It was never intended and should never be read as an authority for making any journey undertaken by a workman from his residence to his place of work as being in the course of his employment.

The other authority relied upon by the Arbitrator is an isolated passage taken from the judgment of Ibrahim Manan J in the case of *Eastern Mining & Metals Co. Sdn. Bhd. v. Wan Absah* [1974] 2 MLJ 210, which runs as follows:

> Section 5(1)(b)(i) of the Worker's Compensation Act, 1928 (Victoria) (No. 3806 of 1928) as amended by Workers' Compensation Act 1946 (Victoria) (No. 5128 of 1946) is almost identical with s. 4(1)(b) of our Ordinance which provides that an accident happening to a workman while travelling to his place of employment shall be deemed to arise out of and in the course of his employment.

Reading the case as a whole, however, it would appear what Ibrahim J meant was that an accident, which occurs in circumstances provided by s. 4(1)(b)of the Ordinance, is deemed to have arisen out of and in the course of the workman's employment.

A better understanding of this situation could be obtained by first looking at s. 4(1)(b), which reads thus:

> (b) An accident happening to a workman while he is, with the express or implied permission of the employer, **travelling as a passenger** by any vehicle, ship, vessel, or aircraft to or from his place of work shall, not withstanding that he is under no obligation to his employer to travel by such means, be deemed to arise out of and in the course of his employment if the accident would have been deemed so to have arisen had he been under such an obligation, and if at the time of the accident, the vehicle, ship, vessel or aircraft **is being operated by or on behalf of his employer** or by some other person by whom it is operated in pursuance of arrangements made with the employer and is **not being operated in the ordinary course of a public transport service ...**

Before this deeming provision can be successfully invoked the following matters will have to be satisfactorily adduced:

(i) The workman was travelling as a passenger;

(ii) The vehicle was being operated by or on behalf of the employer;

(iii) Such vehicle was not operated by a public transport service.

What the learned Judge was saying was that once the above matters under 4(1)(b) have been made out, then any accident which happened in the course of that journey would be deemed to have arisen out of and in the course of the workman's employment. In that case not only was the workman held to be travelling as a passenger on a train service provided by the employer but the learned Judge also found that the nature of work of the deceased was the contributory cause of his death.

The *Eastern Mining* case is decided on entirely different facts from our present case and should never be misunderstood as conveying the authority that an accident happening to a workman whilst travelling to his place of employment must necessarily be deemed to have arisen out of and in the course of his employment.

Having decided that the Arbitrator had misapplied the law in this case, we shall nevertheless have to ascertain from the record whether the circumstances of the accident support the respondent's contention that it arose in the course of and out of his employment.

Now by s. 4(5) of the Workmen's Compensation Ordinance, 1952 an accident, which arises in the course of an employment, is deemed to have arisen out of the employment. It is therefore necessary only for the respondent to prove one limb of s. 4, i.e., the accident arose in the course of employment. The term 'in the course of employment' does not really mean during the currency of the engagement. It means in the course of the work which the workman is employed to do and matters incidental to that work. A workman's temporary absence from his work for the purpose of attending to matters of his own is not incidental to his work - see *Charles P. Davidson & Co. v. M'Robb* [1918] AC 304 at 314 & 315. The true test in this matter, according to *St. Helens Colliery Co. Ltd. v. Hewiston* [1924] AC 59 is based on the ground of whether the duty which the workman owes to his employer arose out of the contract of employment.

In our present case there does not appear to be any duty arising out of the contract of employment that the workman should reside 15 to 20 miles away from the estate and there is no obligation for him to travel to work on the motor cycle. He was free to travel in the manner or on a vehicle of his own choice - he may ride pillion to another motor cyclist or travel as a passenger in his friend's car or even use the public transport service. His duty to his employer only commenced on his reaching the estate. As evidenced in the records, he is paid for the day in proportion to his daily output of latex he was able to tap. If he did not turn up for the day and produce nothing, he is not paid anything. His course of employment began in the morning when he passed the gates or crossed into the boundary of the appellant's estate and ended when he left it - see *Gilmour v. Dorman, Long & Co. Ltd.* [1911] LT 105.

As a general rule, a man's employment does not being until he has reached his place of work or the scene of his duty - *Willis's Workmen's Compensation*, 36th Edn., p. 24. This was cited with approval by Finlay LJ in the Court of Appeal case of *Netherton v. Coles* [1945] 1 All ER 277 at p. 279 in which case it was held that the journeys of a workman did not form any part of his service since he was at liberty, outside his working hours, to choose his own time and method of transport to and from his actual work.

With respect and my greatest sympathy to the respondent, I feel bound to say that an accident which happened some 10 miles away in the course of a workman's journey to his place of work whilst travelling on his own transport and before he commences his work for the day would not bring his accident within the course of employment. If I may echo the words of Finlay LJ in *Netherton's* case (*supra*):

> Outside working hours, in order to bring an accident within the course of the employment, there must be a duty owed by the workman to the employer under the contract either to be where he is when he meets with his accident, or to be engaged in performing some task, called for by the contract by means of the specified journal. Without such a limitation the contention of Counsel for the respondent would bring every workman within his 'employment when going to or returning from work'.

Lastly, reverting to the Arbitrators' judgment, there is a somewhat vague and veiled contention that the appellant had admitted that the journey was in the course of his employment. This stems from the appellant's answer to the respondent's Counsel's cross-examination, which was as follows:

> The trip that the deceased took on 29 June 1975 was in furtherance and in connection with my estate's business.

I think both Counsel will agree with me that the term 'in the course of employment' is a complicated legal terminology which is ill understood not only by laymen but also by a few legally qualified. For that reason we have to refer to text books and cite the judgments of several eminent Judges before determining when such a situation exists. The mere mention by a layman that the journey was taken in connection with and in furtherance of his estate's business does not mean that the appellant had by this contended 'admission' proven for the respondent that the journey was undertaken 'in the course of the employment'. To be so he must first understand the meaning of that terminology and even if he did, the words 'in furtherance and in connection' do not presume the existence of a duty owed to the employer or that the workman's employment commenced from the moment he travelled from his home.

If the respondent had entertained any serious view about this alleged admission, he should have invoked O. 22 r. 3 of the Subordinate Court Rules 1980, instead of acquiescing in the issue of the certificate for the above two questions on law to be determined by this Court.

The respondent, to my mind, had failed to establish before the Arbitrator that the accident arose out of and in the course of his employment. This appeal must therefore be allowed.

The order of the Arbitrator for the appellant to pay compensation assessed at RM5,400 is quashed. The respondent has to pay the costs of the appeal.

Also found at [1983] 1 CLJ 28